

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DR. GREGORY CARTER, M.D. and
ERIC JERVIS,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, et al.,

Defendants.

CASE NO. C16-0809-JCC

ORDER DENYING PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION

This matter comes before the Court on Plaintiffs' Motion for a Preliminary Injunction (Dkt. No. 7), Defendants' Response (Dkt. No. 18), and Plaintiffs' Reply (Dkt. No. 21). The Court has also reviewed the Complaint (Dkt. No. 1). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

Plaintiffs move the Court to enjoin a piece of Washington State legislation from taking effect on July 1, 2016. (Dkt. No. 7.) The legislation in question, the Cannabis Patient Protection Act ("CPPA") deals with access to medical marijuana.

A. History of Marijuana Laws in Washington State

In November 1998, Washington voters passed Washington Initiative 692 ("I-692"), a law authorizing medicinal marijuana use for qualifying persons suffering from terminal or

1 debilitating conditions. (*See* Dkt. No. 18-1.) As codified, I-692 is also known as the Washington
2 State Medical Use of Marijuana Act (“MUMA”), Rev. Code Wash. § 69.51A. While the use and
3 possession of marijuana was still considered criminal under the federal Controlled Substances
4 Act (“CSA”), 21 U.S.C. § 801, *et seq.*, and the Washington Uniform Controlled Substances Act,
5 Rev. Code Wash. § 69.50, *et seq.*, the MUMA provided doctors, patients, and primary caregivers
6 with an affirmative defense to a criminal prosecution under state law. (Dkt. No. 18-1 at 3; *see*
7 *also* Rev. Code Wash. § 69.51A.005.) The MUMA was silent with respect to how patients might
8 obtain medical marijuana, and did not provide a regulatory structure. (Dkt. No. 18-1.)

9 In 2012, Washington voters passed Initiative 502 (“I-502”) which authorized adult
10 marijuana possession and use for recreational purposes. I-502, *available at*
11 http://sos.wa.gov/_assets/elections/initiatives/i502.pdf. I-502 established regulatory authority
12 with the State Liquor and Cannabis Board (“LCB”). I-502 § 1(3). The LCB has since been
13 empowered to regulate and tax a retail market for recreational marijuana sales, with processing
14 beginning in 2013 and retail sales ongoing since 2014. (Dkt. No. 18 at 2.)

15 Washington’s legalization of recreational marijuana has been broadly recognized as
16 experimental. Marijuana remains a controlled substance under federal law. 21 U.S.C. §§ 841,
17 844. Since the passage of I-502, the United States Department of Justice issued a policy
18 statement, known as the “Cole memo,” with respect to states that had legalized marijuana. (Dkt.
19 No. 18-2 at 2–5.) The Justice Department articulated its priorities for federal marijuana
20 enforcement and in so doing indicated that it did not intend to interfere with state laws such as I-
21 502. (*Id.*) The Cole memo acknowledged that “the federal government has traditionally relied on
22 states and local law enforcement agencies to address marijuana activity through enforcement of
23 their own narcotics laws.” (*Id.* at 3.) Far from providing the states *carte blanche* with respect to
24 marijuana regulation, the federal government indicated that it may intervene if jurisdictions fail
25 to implement effective regulatory schemes. (*Id.* at 4.) “The Department’s guidance in this
26 memorandum rests on its expectation that states and local governments that have enacted laws

1 authorizing marijuana-related conduct will implement strong and effective regulatory and
2 enforcement systems that will address the threat those state laws could pose to public safety,
3 public health, and other law enforcement interests.” (*Id.* at 3.) No steps have been taken by the
4 federal government to stop the implementation of I-502. (Dkt. No. 18 at 2.)

5 During the 2015 legislative session, the Washington Legislature adopted Senate Bill 5052
6 (“SB 5052”), also known as the Cannabis Patient Protection Act (“CPPA”). LAWS of 2015 SB
7 5052, c 70, *available at* [http://lawfilesexternal.wa.gov/biennium/2015-](http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Passed%20Legislature/5052-S2.PL.pdf)
8 [16/Pdf/Bills/Senate%20Passed%20Legislature/5052-S2.PL.pdf](http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Passed%20Legislature/5052-S2.PL.pdf). SB 5052 serves as an
9 amendment to the MUMA, and aims to integrate the medical and recreational marijuana markets
10 and for the first time establish regulatory oversight for medical marijuana in Washington State.
11 *Id.* at § 2. (“[T]he state now has a system of safe, consistent, and adequate access to marijuana;
12 the marketplace is not the same marketplace envisioned by the voters in 1998.”) The present
13 lawsuit seeks to enjoin the implementation of SB 5052, which is set to take effect July 1, 2016.

14 **B. The Present Litigation**

15 Plaintiff Eric Mevis is a medical marijuana patient who suffers from a rare, terminal
16 neurodegenerative disorder and experiences extreme pain, muscle spasms, an inability to speak
17 or swallow, and wasting. (Dkt. No. 1 at 3–4.) The use of medical marijuana has been essential to
18 managing his symptoms. (*Id.* at 4.) Plaintiff Dr. Gregory Carter is a physician with twenty-five
19 years’ experience who “treats numerous patients for whom he believes marijuana is a medically
20 appropriate form of treatment.” (*Id.* at 3.)

21 Plaintiffs oppose the implementation of SB 5052 and object to some of its regulations
22 including (1) the use of mandatory forms in prescribing medical marijuana in specific doses, and
23 (2) a requirement that physicians divulge patients’ medical conditions to third-parties on a form
24 that patients take to marijuana retailers. Ostensibly, Plaintiffs are concerned with the risk of
25 federal criminal prosecution under the medical marijuana regime suggested by SB 5052. (Dkt.
26 No. 7 at 7) (“Doctors and patients are now being required to participate in a system that puts both

1 at risk by violating federal law with no defense available in federal court”). Associated with that
2 fear of prosecution, Plaintiffs suggest that SB 5052 threatens the protected doctor-patient
3 relationship, as doctors will not speak with their clients about medical marijuana use or fill out
4 the forms established under the new regulatory system out of fear of incriminating themselves or
5 their clients. (Dkt. No. 7 at 15.) Plaintiffs bring this action against Defendants, Washington State
6 officials in their official capacity, seeking “a declaration that physicians and patients have the
7 right, protected by the First Amendment to the U.S. Constitution, to communicate in the context
8 of a bona fide physician-patient relationship, without intervention by the Defendants, about the
9 issue of marijuana as medicine.” (Dkt. No. 1 at 2.)

10 Plaintiffs now move for a preliminary injunction to either “stop SB 5052 from taking
11 effect on July 1, 2016 or an order striking I-502.” (Dkt. No. 7 at 8.) In so moving, Plaintiffs rely
12 on the same legal claims that form the core of their complaint: (1) that SB 5052 is preempted by
13 the federal CSA, and (2) that SB 5052 impermissibly infringes on the doctor-patient relationship
14 protected by the First Amendment. (*Id.* at 14–15; Dkt. No. 1 at 17–18.)

15 **II. DISCUSSION**

16 **A. Standard of Review**

17 Under Fed. R. Civ. P. 65(a), the Court may issue a preliminary injunction if a plaintiff
18 establishes that she “[1] is likely to succeed on the merits, [2] that [s]he is likely to suffer
19 irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [her]
20 favor, and [4] that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*,
21 555 U.S. 7, 20 (2008). Mandatory preliminary injunctions, the kind requested here, are generally
22 disfavored in the law, and will only be ordered when the law and facts clearly favor the moving
23 party. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319–20 (9th Cir. 1994).

24 **B. Winter Factors**

25 **1. Likelihood of Success on the Merits**

26 Plaintiffs argue that they demonstrate a high likelihood of success on the merits of their

underlying case due to the illegality of SB 5052 under the federal CSA. (Dkt. No. 7 at 14.) In large part, Plaintiffs rest this argument on the understanding that both I-502 and SB 5052, if properly challenged, would be considered preempted by federal law. (Dkt. No. 7 at 12) (“It was widely conceded . . . by the proponents of I-502 that it was entirely pre-emptible under federal preemption analysis . . . Then US Attorney for the Western district of Washington, Jenny Durkan, was quoted in the paper as saying she did not know a single lawyer who thought otherwise.”) However, as Defendants point out, Plaintiffs must first demonstrate that they are authorized to bring a private suit under the causes of action they allege: the First Amendment, the Supremacy Clause, and the CSA. (Dkt. No. 18 at 6.)

a. Potential Lack of Jurisdiction for Failure to Bring a Cause of Action

Plaintiffs assert, in their Complaint, that the Court has jurisdiction under 28 U.S.C. § 1343(3). (Dkt. No. 1 at 2.) However, § 1343 is a jurisdictional statute and does not create a cause of action. *See American Science & Engineering, Inc. v. Califano*, 571 F.2d 58, 63 n. 8 (1st Cir. 1978) (28 U.S.C. § 1343 “only comes into play where a cause of action exists”); *Campbell v. Gadsden Cty. Dist. Sch. Bd.*, 534 F.2d 650, 653 n. 3 (“[S]ection 1343 jurisdiction is unavailable in the absence of an appropriate cause of action”); *Liikane v. City of Seattle*, 2007 WL 445957, at *2 (W.D. Wash. Feb. 7, 2007).

It is well established that the Supremacy Clause does not create a private right of action. “[T]he Supremacy Clause is not the ‘source of any federal rights,’ and certainly does not create a cause of action.” *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (internal citations omitted). Nor does the First Amendment confer a private right of action, although a First Amendment claim may proceed against a federal officer under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Plaintiffs’ case does not fall under the purview of *Bivens*.

The CSA also does not confer a right of action for citizen suits. “Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.”

1 *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citing *Touche Ross & Co. v. Redington*, 442
2 U.S. 560, 578 (1979)). “The judicial task is to interpret the statute Congress has passed to
3 determine whether it displays an intent to create not just a private right but also a private
4 remedy.” *Id.* (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)). In
5 drafting the CSA, Congress made its intent explicit: “No private right of action is created under
6 this subsection.” 21 U.S.C. § 882(5).

7 In response, Plaintiffs assert that the First, Fourth, and Fifth Amendments “give rise to a
8 cause of action” under equity principles. (Dkt. No. 21 at 2.) Setting aside the fact that Plaintiffs
9 do not bring a cause of action under either the Fourth or Fifth Amendments, it is true that federal
10 courts “have long entertained suits in which a party seeks prospective equitable protection from
11 an injurious and preempted state law without regard to whether the federal statute at issue itself
12 provided a right to bring an action” under the doctrine established in *Ex Parte Young*, 209 U.S.
13 123 (1908). *Armstrong*, 135 S. Ct. at 1391 (citing cases). With respect to a cause of action under
14 the CSA, this argument was squarely dismissed by the United States Supreme Court in
15 *Armstrong*: “[R]espondents cannot, by invoking our equitable powers, circumvent Congress’s
16 exclusion of private enforcement.” 135 S. Ct. at 1385.

17 In summary, the legal authorities under which Plaintiffs bring the above-captioned
18 matter, the Supremacy Clause, the CSA, and the First Amendment, do not confer a private cause
19 of action for citizens to bring suit. This substantially mitigates the likelihood that Plaintiffs will
20 prevail on the merits of this case, though under the doctrine established by *Ex Parte Young*, it is
21 possible that Plaintiffs may proceed under an equity theory for their First Amendment claim. *See*
22 *Armstrong*, 135 S. Ct. at 1391. The Court notes that in forming this initial glimpse into the
23 jurisdictional issues of this case, it does not reach the merits of Defendants’ pending motion to
24 dismiss. (Dkt. No. 20.) Further review may demonstrate whether this suit, under either legal
25 theory, should proceed under an equity theory.

26 **b. Further Issues with the Merits of Plaintiffs’ Case**

1 In addition to potential jurisdictional issues, Plaintiffs’ likelihood of success on the merits
2 is weakened by a lack of clarity regarding the allegedly injurious nature of SB 5052.

3 As Defendants argue in their response, SB 5052 was passed in order to afford further
4 protections to medical marijuana patients: by establishing oversight over the previously
5 unregulated medical marijuana market, by ensuring laboratory analysis of products sold to
6 qualifying medical patients, by requiring that those who produce and distribute medical
7 marijuana are licensed, and providing access to tax-exempt medical marijuana in higher
8 quantities—as prescribed by a physician—than that available to medical marijuana patients
9 under either the MUMA or I-502. (Dkt. No. 18 at 3–4.) SB 5052 establishes a medical marijuana
10 database that will be maintained by the Department of Health and subject to strict confidentiality
11 limitations; for example, persons who disclose information in the database or access information
12 to which they are not entitled are subject to prosecution for a Class C felony. (Dkt. No. 15 at 8’
13 Dkt. No. 18-3.) And, contrary to Plaintiffs’ assertion that “[t]he legislature is turning thousands
14 of patients into felons overnight,” SB 5052 provides affirmative defenses to both doctors and
15 patients for criminal prosecution. (Dkt. No. 18-1 at 3.)

16 The Court understands Plaintiffs as seeking a declaration that SB 5052 unconstitutionally
17 (1) infringes on the rights of patients and doctors to communicate about marijuana as medicine
18 and (2) exposes doctors and patients to criminal prosecution. (Dkt. Nos. 1 and 7.) However, the
19 Court’s initial review of SB 5052 and the current record does not establish a strong likelihood of
20 Plaintiffs’ success on this theory: SB 5052 appears to protect both patients and doctors, contains
21 provisions similar to those in the MUMA to allay fear of criminal prosecution, and sets forth
22 protections to ensure that patient information—even entered into a database—is subject to strict
23 confidentiality. (Dkt. No. 18-1.)

24 In summary, consideration of the likelihood of Plaintiffs’ success on the merits weighs
25 against the entry of a preliminary injunction.

26 **2. Likelihood of Irreparable Harm**

1 Next, the Court turns to the likelihood of irreparable harm. Plaintiffs must demonstrate
2 that an irreparable injury is not merely *possible*, but *likely*, absent injunctive relief. *Winter*, 555
3 U.S. at 22. As discussed above, Plaintiffs assert they will suffer two key injuries if SB 5052 takes
4 effect: (1) a restraint on doctor-patient candor in discussions regarding medical marijuana usage,
5 presumably out of fear of prosecution and invasion of privacy interests, and (2) criminal
6 prosecution itself. (Dkt. Nos. 1 and 7.) Both potential injuries are speculative.

7 First, Plaintiffs seem to misconstrue SB 5052’s likely effect on doctor-patient
8 communication. While, to purchase marijuana in medical quantities will require the use of
9 authorization forms, Plaintiffs ignore the privacy protections SB 5052 provides in terms of
10 limiting access to patient information such as strict penalties for any misuse of the medical
11 marijuana patient database. And, as Defendants point out, in many instances the availability of
12 medical marijuana authorization forms may actually facilitate, rather than dissuade, doctor-
13 patient discussions about medical marijuana.

14 Second, the likelihood that Plaintiffs will face criminal prosecution is not substantially
15 increased by the passage of SB 5052. While subject to additional state regulations, the regime
16 under SB 5052 provides for affirmative defenses to state prosecution. And marijuana use is
17 treated no differently under federal law with the passage of SB 5052: it was illegal under the
18 MUMA, illegal under I-502, and remains illegal now. To suggest an imminence of federal
19 criminal prosecution under the medical marijuana system set forth by SB 5052 ignores the
20 policies expressed by the United States Department of Justice in the Cole memo. In fact, as the
21 Cole memo explains, the federal government may be more likely to intervene in instances where
22 a state or jurisdiction fails to “implement strong and effective regulatory and enforcement
23 systems.” (Dkt. No. 18-2 at 3.) SB 5052 offers a stronger regulatory system than that previously
24 presented under the MUMA. While a change in DOJ priorities could affect the likelihood that
25 Plaintiffs and those in similar circumstances would face federal prosecution, the named
26 Defendants are powerless over any such change.

1 Consideration of the likelihood of irreparable harm factor similarly weighs against entry
2 of a preliminary injunction.

3 **3. Balance of Equities and Public Interest**

4 Next, the Court assesses whether the balance of equities tips in Plaintiffs' favor and the
5 injunction is in the public interest. *Winter*, 555 U.S. at 20. These factors may be considered
6 together. *A.H.R. v. Wash. State Health Care Auth.*, 2016 WL 98513, at *17 (W.D. Wash. Jan. 7,
7 2016).

8 Plaintiffs focus on the confusion doctors and patients face due to the "interrelationship, in
9 this state, between the 502 recreational scheme and medical marijuana." (Dkt. No. 7 at 19.)
10 Without citation or support, Plaintiffs argue that "[t]here are well over a hundred thousand
11 patients with authorizations and scores of doctors [who] have no idea how their rights and
12 responsibilities are changing." (*Id.* at 20.)

13 The Court certainly appreciates the confusion that many Washington citizens may feel
14 with respect to the relationship between medical marijuana, recreational marijuana, and federal
15 law. Additionally, the Court does not take lightly the discussion of how crucial medical
16 marijuana is to relieving Plaintiff Mevis's painful symptoms. However, an injunction halting
17 implementation of SB 5052 does not further either of those interests.

18 Contrary to Plaintiffs' assertions, SB 5052 advances the public interest by establishing
19 protections for medical marijuana patients, both legally and with respect to the safety of the
20 products they use. Furthermore, the structure established by SB 5052 may alleviate the confusion
21 regarding medical and recreational marijuana, through public education and the requirement that
22 marijuana retail stores have a medical marijuana consultant on staff. *See* WAC 314-55-080
23 (proposed).

24 Finally, the implementation of SB 5052 need not halt Plaintiff Mevis's access to the
25 medical marijuana he so desperately needs. Though the procedures will change, SB 5052 exists
26 to enable qualifying patients to gain access to medical marijuana.

1 Consideration of both the balance of equities and the public interest weighs against a
2 preliminary injunction.

3 **III. CONCLUSION**

4 For the foregoing reasons, considering the factors established in *Winter*, 555 U.S. 7
5 (2008), Plaintiffs' motion for a preliminary injunction (Dkt. No. 7) is DENIED.

6 DATED this 30th day of June 2016.

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A handwritten signature in black ink, reading "John C. Coughenour", is written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE